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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1471

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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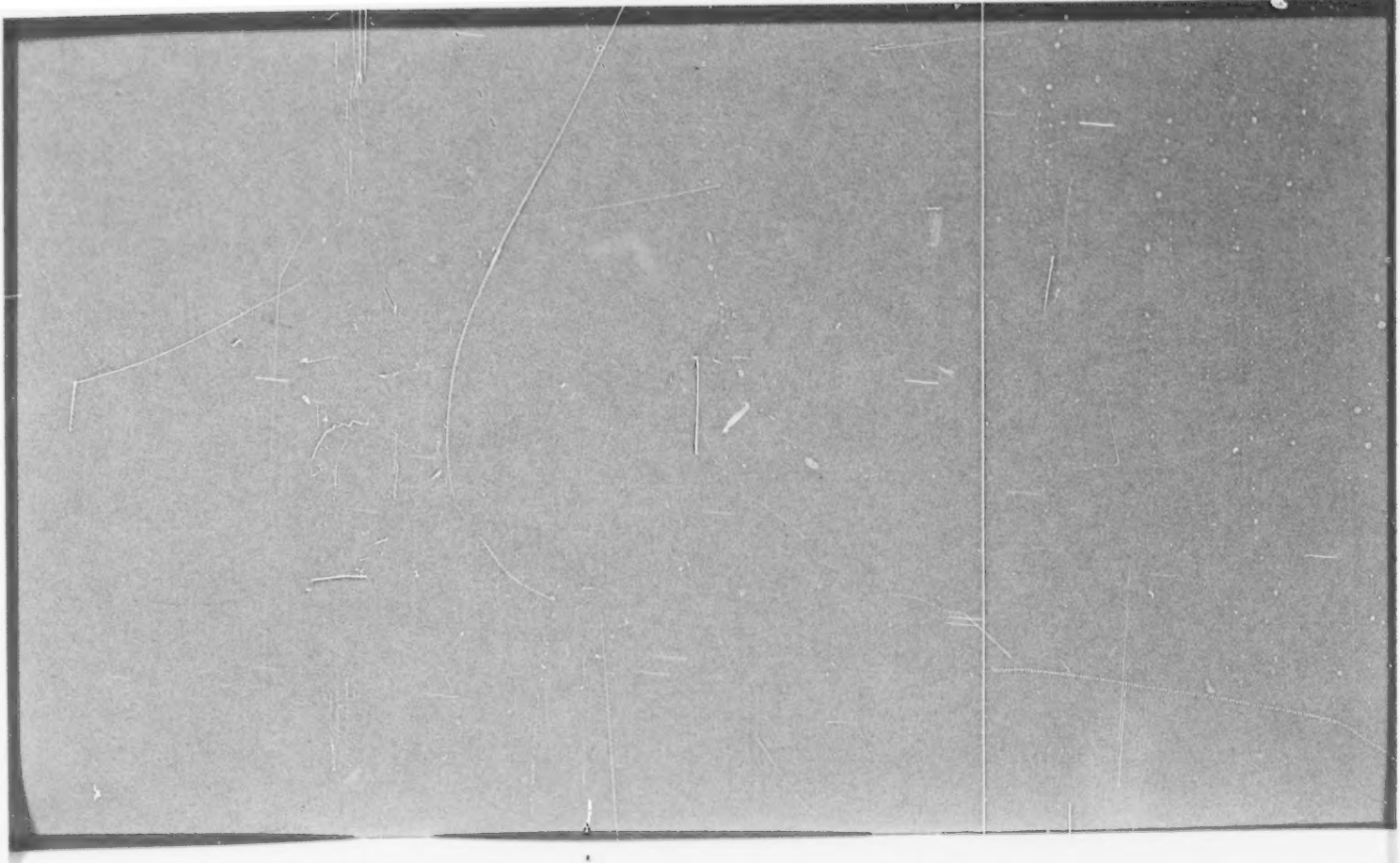

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ARGUMENT

The Court should grant the petition for writ of certiorari to resolve the continuing uncertainty of the Federal Communications Commission concerning the applicability of the lottery provision of the Federal Communications Act (18 U.S.C. §1304) to the broadcasting as part of regularly scheduled news shows of winning numbers in a legal state lottery.

The primary issue in this case is whether Congress, by including a provision in the Communications Act of 1934

(48 Stat., ch. 652, 18 U.S.C. §1304) prohibiting the broadcasting of advertisements or information concerning any lottery, intended to interefere with the normal freedom of the broadcast news media to include in regular news broadcasts information concerning legal lotteries which they have determined the public has an interest in knowing.

Section 1304 prohibits the broadcasting of "any advertisement or information concerning any lottery." Obviously, it would be inappropriate to interpret the word "information" in §1304 literally to prohibit any broadcast communication pertaining to lotteries. Otherwise, even an editorial condemning lotteries or a human interest story concerning a winner would be barred. Rather, the word "information" should be read in light of its association with "advertisement". As the Court noted in *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961):

> "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the acts of Congress."

It is most appropriate to apply this rule in the instant case in light of the strict construction which has been accorded the parallel provisions of 18 U.S.C. §1302, the absence of any indication that Congress in including this provision in the Communications Act of 1934 intended to impose any restriction on news broadcasting, the fact that the statute is penal in nature, and the serious First Amendment problems raised by any attempt to censor news broadcasting.

When §1304 is read in this light, it is reasonable to limit the term "information" to direct promotional activity.

The word "advertising" alone could be construed to apply only to promotional activity for which compensation is paid to the broadcaster. It has long been common, however, for lotteries to be operated by charitable organizations such as churches, volunteer fire departments and hospitals. Such organizations are frequently able to announce their activities in the broadcast media without the payment of any compensation to the broadcaster. Since these public interest announcements might not be found to be "advertisements," it is reasonable to infer that Congress added the word "information" to clearly indicate that all direct promotional activity concerning a lottery, not just what is technically "advertising," would be prohibited.

There is a substantial difference between promotional activity on behalf of the operator of a lottery which is not technically "advertising" and the broadcasting of news about a lottery which is included on regular news shows in response to public interest in the information. The news function of the communications media has always enjoyed a preferred position because it touches so closely on First Amendment freedoms. *New York Times Company* v. *United States*, 403 U. S. 713 (1971). Indeed, Congress itself included an express provision in the Communications Act directing the F.C.C. to respect First Amendment values. 47 U.S.C. §326. Therefore, if it had intended 18 U.S.C. §1304 to impose restrictions on regular news broadcasting, Congress would have expressed this intention in clear and unequivocal language.

The broadcasting on the day of the drawing of the winning number drawn by the New Jersey Lottery as part of three regularly scheduled news shows constitutes "news" about the lottery. The broadcast of the winning lottery number is undeniably a report of a current event of public interest. The form and content of the program is that of the straight newscast. Furthermore, the program is ini-

tiated, produced and controlled by the station, which makes the editorial judgment that the broadcast of winning lottery numbers is newsworthy. Therefore, the Third Circuit *en banc* correctly held that:

> ". . . [t]he announcements here involved are unadulterated broadcast journalism—news—and clearly are protected by 47 U.S.C. §326 and the first amendment rather than prohibited by 18 U.S.C. §1304." (App. 9a-10a).

Although the unanimous opinion of the Third Circuit sitting *en banc* thus correctly interpreted §1304 as not having been intended to prohibit the broadcasting of winning lottery numbers as part of regular news broadcasts, there are several reasons why it would be appropriate for the Court to grant certiorari.

First, the F.C.C. takes the position in its petition that the decision of the Third Circuit in this case is inconsistent with *New York State Broadcasters Association* v. *United States*, 414 F. 2d 990 (2nd Cir. 1969), and that there is, therefore, a conflict in the circuits. Although the State of New Jersey disagrees with this view, the fact that the F.C.C. takes the position that there is a conflict in the circuits suggests that it will not adhere to the decision of the Third Circuit in its regulation of the broadcast news media outside of the circuit. At a minimum, the uncertainty created by this alleged conflict undoubtedly will lead many broadcasters to refrain from broadcasting winning lottery numbers, even though they would conclude in the exercise of their uninhibited editorial judgment that there was sufficient public interest in winning lottery numbers to include them as part of regular news broadcasts. This continuing inhibition upon the exercise of the broadcast news media's judgment as to what is newsworthy is of concern to the

State of New Jersey and its citizens, because most of the news broadcasts into the northern sections of the State originate outside of the Third Circuit in New York City. It would appear, therefore, that only a final resolution by the Court of the issues presented by this case will afford the citizens of the State of New Jersey a full opportunity to hear news concerning the New Jersey State Lottery.

Secondly, the extent of the federal government's constitutional authority to prohibit the broadcast news media from broadcasting news about legal state lotteries is a question of broad public significance. There are now eight states which operate lotteries which have been duly authorized by legislation and/or constitutional amendment in those states. There is also strong public interest in lotteries in the states which operate them. Therefore, the states have a significant interest in finally establishing the extent of the federal government's power to restrict the flow of information concerning legal state lotteries.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the Court should grant the petition for writ of certiorari.

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